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No. 92-521

IN THE

Supreme Court of the United States

October Term, 1992

EUGENE H. DUFFY, *et al.*,

Petitioners,

against

JAMES W. WETZLER, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION—SECOND DEPARTMENT

Brief for Respondents Wetzler, Chu and Regan in Opposition

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(2559—LC7-704—1992)

Questions Presented

1. Whether this Court's decision in *Davis v Michigan Dept. of Treasury*, 489 U.S. 803 (1989), may be applied prospectively only.

2. Whether petitioners' claim that they have been arbitrarily denied a clear and certain remedy provides a basis for granting the writ of certiorari.

3. Whether petitioners' claimed conflicts with this Court's decisions in *Howlett v Rose*, 496 U.S. 356 (1990); *Hafer v Melo*, ____ U.S. ____, 112 S. Ct. 358, 116 L. ed. 2d 301 (1991), or *Felder v Casey*, 487 U.S. 131 (1988), provide a basis for granting the writ of certiorari.

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT APPELLATE DIVISION—SECOND DEPARTMENT

Brief for Respondents Wetzler, Chu and Regan in Opposition

Opinions Below

The opinion of the New York State Supreme Court, Appellate Division, Second Department (Pet. App. 1a-18a) is

reported at 174 A.D.2d 253, 579 N.Y.S.2d 684.[1] The opinion of the New York State Supreme Court, Queens County (Pet. App. 25a-38a), is reported at 148 Misc. 2d 459, 555 N.Y.S.2d 543. The orders of the New York State Court of Appeals dismissing petitioners' appeal (Pet. App. 51a-52a) and denying petitioners' motion for leave to appeal (Pet. App. 58a-59a) are reported respectively at 79 N.Y.2d 976, 583 N.Y.S.2d 190, 592 N.E.2d 798, and 80 N.Y.2d 890, 587 N.Y.S.2d 900, 600 N.E.2d 627 (1992).

Jurisdiction

The opinion of the Appellate Division, Second Department was entered on January 15, 1992 (Pet. App. 18a). The dismissal by the New York State Court of Appeals, *sua sponte*, of petitioners' appeal as of right pursuant to section 5601(b)(1) of the New York Civil Practice Law and Rules was dated April 7, 1992 (Pet. App. 51a). The denial by the New York State Court of Appeals of petitioners' motion for leave to appeal pursuant to sections 5602(a)(1)(i) and 5514(a) of the New York Civil Practice Law and Rules was dated July 7, 1992 (Pet. App. 58a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

Statement of the Case

For fifty years prior to this Court's decision in *Davis v Michigan Department of Treasury*, 489 U.S. 803 (1989) ("Davis"), New York has excluded from taxation pensions paid to former officers and employees of the State of New York and its subdivisions and agencies. N.Y. Const. Art. XVI, § 5; former N.Y. Tax Law § 612(c)(3). Pensions paid

[1] "Pet. App." refers to the appendix to the certiorari petition in No.

to other retirees, including former employees of the federal government, were subject to taxation.[2] Former N.Y. Tax Law § 612(a).

This Court's decision in *Davis*, which struck down provisions of the Michigan tax laws exempting from taxation retirement benefits paid by that State or its political subdivisions while taxing retirement benefits paid by all other employers including the federal government as violative of 4 U.S.C. § 111 and the principles of intergovernmental tax immunity, sent shock waves through at least twenty States that had similar tax provisions. New York immediately acted to conform its tax laws to the *Davis* ruling, amending section 612(c)(3) of the Tax Law to exclude from taxation pensions paid to former officers and employees of the federal government. L. 1989, ch. 664, §§ 1, 2.[3] The amendment was made applicable to federal pension benefits received in taxable years beginning on or after January 1, 1989. L. 1989, ch. 664, § 3.

Two months after this Court decided *Davis*, petitioners, retired federal employees and their spouses, commenced this action against various New York State and City officials, and the City of New York, in New York Supreme Court, Queens County, seeking declaratory, injunctive and monetary relief under state and federal law. In their second amended complaint, petitioners alleged as a first cause of action under 42 U.S.C. § 1983 that the pre-1989 New York State and City tax laws violated their rights under 4 U.S.C. § 111, princi-

[2]Since 1981, the first $20,000 in pension income to all retirees who have attained the age of 59½, including federal retirees, has been excluded from taxation. N.Y. Tax Law 612(c)(3-a); L. 1981, ch 103, § 60.

[3]Corresponding provisions in section 11-1712(c)(3) of the New York City Administrative Code were also amended to conform to the *Davis* ruling.

ples of intergovernmental tax immunity, and the Due Process and Equal Protection Clauses of the United States Constitution. As a second cause of action, petitioners sought a declaration that section 612(c)(3) of the Tax Law and section 11-1712(c)(3) of the New York City Code violated these same constitutional and statutory provisions. As a third cause of action, petitioners sought an injunction against the State and City respondents to prevent them from continuing to collect taxes on federal pensions for the years 1986 through 1989. Petitioners alleged as a fourth and final cause of action that the City of New York is liable for monies had and received. Petitioners also sought class certification. Respondents duly answered and interposed various defenses.

Petitioners moved for partial summary judgment on their second cause of action for declaratory relief and renewed a prior application for class certification. Both the State and City respondents cross-moved for summary judgment dismissing the complaint taking the position that *Davis* should be given only prospective effect.

In its Memorandum Decision dated April 10, 1990, Supreme Court, Queens County, reasoned that, regardless of whether *Davis* is to be applied retroactively, New York State law requires refunds (Pet. App. 31a-33a, 148 Misc. 2d 459, 465-66, 555 N.Y.S.2d 543, 546-48). The court granted judgment in favor of petitioners declaring that the City and State personal income tax scheme which taxed federal pension benefits received prior to January 1, 1989, while exempting from taxation State and local pension benefits, was discriminatory, invalid and unconstitutional in light of *Davis*, and that petitioners are entitled to refunds of personal income taxes paid on federal pension benefits for the years

1986 through 1988, provided that they file for refunds and meet the procedural requirements for refunds under the Tax Law (Pet. App. 37a, 148 Misc. 2d at 470, 555 N.Y.S.2d at 550).[4] The court also enjoined respondents from assessing and collecting personal income taxes on federal pension benefits received in the years 1986 through 1988 and from interfering with petitioners' rights to file for a refund of personal income taxes paid on federal benefits for the years 1986 through 1988 (Pet. App. 35a-36a, 148 Misc. 2d at 470, 555 N.Y.S.2d at 550).

The court granted, in part, respondents' motion to dismiss petitioners' first cause of action for monetary relief under 42 U.S.C. § 1983 on the ground that petitioners failed to show that the named State and City defendants had personally engaged in any civil rights violation (Pet. App. 34a-35a, 148 Misc. 2d at 467-69, 555 N.Y.S.2d at 548-49). The court also dismissed petitioners' fourth cause of action against New York City for monies had and received because petitioners failed to comply with a State law protest requirement (Pet. App. 36a-38a, 148 Misc. 2d at 469-70, 555 N.Y.S.2d at 549-50). Finally, the trial court denied petitioners' motion for class certification because class relief is inappropriate where governmental actions are involved and subsequent plaintiffs will be adequately protected under the doctrine of *stare decisis* (Pet. App. 29a-31a, 148 Misc. 2d at 464-65,

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[4]The State respondents do not concede that petitioners "have satisfied all procedural requirements imposed by the New York Tax Law", as asserted in the Petition, page 5, note 2. We do recognize, however, that taxpayers who have filed adequate and timely claims on the basis of *Davis* with the New York State Department of Taxation and Finance pursuant to New York Tax Law §§ 686, 687, need take no further action to protect their rights until and unless the Department denies such claims after a final resolution of this case.

555 N.Y.S.2d at 546). An order and judgment was entered accordingly on July 26, 1990 (Pet. App. 39a-44a).[5]

On appeal and cross appeal, the Appellate Division, Second Department, in its Opinion and Order of January 15, 1992, modified the order and judgment of Supreme Court, Queens County, by deleting those portions of that order and judgment which granted petitioners' declaratory and injunctive relief, and as so modified, affirmed (Pet. App. 1a-18a). The Appellate Division held that state law does not require refunds unless there is an antecedent determination that *Davis* is to be applied retroactively (Pet. App. 7a, 174 A.D.2d 253, 258-59, 579 N.Y.S.2d 684, 687). The court, after examining this Court's decision in *James B. Beam Distilling Co. v Georgia*, ____ U.S. ____, 111 S. Ct. 2439, 115 L. ed. 2d 481 (1991), ruled that the appropriate analysis of the prospectivity issue is governed by *Chevron Oil Co. v Huson*, 404 U.S. 97 (1971) (Pet. App. 7a-14a, 174 A.D.2d at 259-64, 579 N.Y.S.2d at 688-91). The Appellate Division recognized that while *Beam* clearly proscribed the use of selective prospectivity, it did not address the precedential vitality of pure prospectivity or otherwise overrule the analysis of *Chevron Oil* (Pet. App. 13a-14a, 174 A.D.2d at 263-64, 579 N.Y.S.2d at 690). Because Michigan had conceded in *Davis* that a refund was appropriate, the Appellate Division concluded that *Beam's* proscription against the use of selective prospectivity was not implicated (Pet. App. 16a,

[5]Petitioners made four post-judgment motions (i) for leave to renew or reargue their application for class certification; (ii) to supplement their pleadings; (iii) to permit intervention by a number of other taxpayers; and (iv) for an award of attorneys' fees to plaintiffs' counsel under the common fund doctrine. Supreme Court denied all such motions by orders entered October 5, 1990, which orders were subsequently affirmed by the Appellate Division, Second Department in its Opinion and Order of January 15, 1992 (Pet. App. 17a).

174 A.D.2d at 265, 579 N.Y.S.2d at 691). Applying the three-pronged *Chevron Oil* analysis, the court held that *Davis* should be given only prospective effect (Pet. App. 14a-16a, 174 A.D.2d at 264-65, 579 N.Y.S.2d at 691).

The Appellate Division also agreed with the trial court's conclusion that the cause of action for damages under 42 U.S.C. § 1983 should be dismissed, adding that, in any event, defendants are protected by the doctrine of qualified immunity (Pet. App. 16a-17a, 174 A.D.2d at 266, 579 N.Y.S.2d at 692). Lastly, the Appellate Division agreed that class certification was properly denied, and that the cause of action against the City respondents for monies had and received was properly dismissed (Pet. App. 16a-17a, 174 A.D.2d at 266, 579 N.Y.S.2d at 692).

The New York State Court of Appeals *sua sponte* dismissed plaintiffs' appeal taken as of right pursuant to N.Y. C.P.L.R. 5601(b)(1) by order dated April 7, 1992 (Pet. App. 51a-52a). The Court of Appeals subsequently denied plaintiffs' application for leave to appeal pursuant to N.Y. C.P.L.R. 5601(a)(1)(i) and 5514(a) by order dated July 7, 1992 (Pet. App. 58a-59a).

ARGUMENT

POINT I

The decision below does not violate the Supremacy Clause and it fully accords with this Court's decisions in *Davis* and *Beam*.

The central issue raised in the petition for writ of certiorari is whether this Court's holding in *Davis* must be applied retroactively to permit federal pensioners to recover state and local taxes paid on their pensions between 1986 and 1988. As petitioners have conceded, this question is identical to the

issue raised by the petitioners in a matter scheduled for briefing and argument before this Court in the current Term. *Harper v Virginia Department of Taxation*, 242 Va 322, 410 S.E.2d 629 (1991), *cert. granted*, No. 91-794, ____ U.S. ____, 112 S. Ct. 1934, 118 L. ed. 2d 541 (1992) ("Harper"). Petitioners' attempt to recast the prospectivity issue into one of whether a state court has "the power to change the effective date of a Congressional enactment" (Pet, p 9) is unavailing. This argument and counterarguments are aptly made by the petitioners and respondents in *Harper* in their briefs to this Court.[6] Consequently, there is no need to grant certiorari in this matter to address the *Davis* issue.

Moreover, we believe the decision of the Appellate Division, Second Department is in all respects sound. *Beam* clearly does not preclude the application of the analysis of *Chevron Oil* to the determination of whether a decision of this Court should be given purely prospective effect. As is discussed in the Brief of Respondent Virginia Department of Taxation in *Harper* and in the *Amici Curiae* Brief of the State of Utah, joined by the State of New York and others, filed in support of respondent in *Harper*, the *Chevron Oil* analysis leads to the conclusion that *Davis* should be applied prospectively only.

POINT II

Petitioners' argument that they have been denied a clear and certain remedy does not provide a basis for granting a writ of certiorari.

Petitioners also argue as a basis for seeking certiorari (Pet, pp 18-21) that respondents, and the New York courts, have

[6]We note that, should this Court decide in *Harper* that *Davis* must be applied retroactively as a federal matter of choice-of-law, the issue of whether New York provides a remedy as a matter of state law remains to be decided in this case.

acted disingenously "to defeat the enforcement of a federal right" (Pet, pp 18-19). Specifically, petitioners assert that in the case of *Hardwick v Cuomo*, 891 F.2d 1097, 1105-06 (3d Cir. 1989), the "Attorney General of New York repesented to the federal courts that prospectivity is not a defense under the personal income tax law of New York" (Pet, p 18). *Hardwick*, however, was completely unrelated to this case. There, nonresident taxpayers promptly challenged the constitutionality of recently enacted New York tax provisions which established progressive personal income tax rates on nonresidents by relating them to their total income. Unlike the situation in *Hardwick*, the issue of prospectivity is raised here because of the longstanding, unchallenged, widespread and reasonable reliance on the validity of pension income tax provisions. Respondents are not being disingenuous or otherwise "playing fast and loose with the courts" (Pet, p 18). Rather, as has this Court in *American Trucking Associations v Smith*, 496 U.S. 167 (1990); *McKesson Corp. v Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990); and *Beam*,[7] as well as the courts of our sister states applying the doctrine in similar tax cases,[8] respondents are working to develop the law regarding the doctrine of prospectivity in accordance with constitutional principles and sound public policy. It cannot be

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[7]*See, also, Ashland Oil, Inc. v Caryl*, 497 U.S. 916 (1990) (*per curiam*); *National Mines Corp. v Caryl*, 497 U.S. 922 (1990) (*per curiam*).

[8]*See, e.g., Harper v Virginia Dept. of Taxation*, 241 Va 232, 401 S.E.2d 868 (1991), *cert granted and judgment vacated by* ____ U.S. ____, 111 S. Ct. 2883, 115 L. ed. 2d 1049 (1991), *on remand*, 242 Va 322, 410 S.E.2d 629 (1991), *cert granted*, No. 91-794, ____ U.S. ____, 112 S.Ct. 1934, 118 L. ed. 2d 541 (1992); *Swanson v North Carolina*, 329 NC 576, 407 S.E.2d 791, *affd on rehg*, 330 NC 390, 410 S.E.2d 490 (1991), *pet for cert pending*, No. 91-1436; *Sheehy v Montana Dept. of Revenue*, 250 Mont 437, 820 P.2d 1257 (1991), *pet for cert pending*, No. 91-1473; *Bass v State of South Carolina*, 414 S.E.2d 110 (1991), *pet for cert pending*, No. 91-1697, *Pledger v Bosnick*, 811 S.W.2d 286 (Ark. 1991), *pet for cert pending*, No. 91-375.

said that application of the prospectivity doctrine and analysis of *Chevron Oil* to this case is "arbitrary".

Next, petitioners' argument (Pet, p 21) that the decision below discriminates against a federal right is answered simply by the fact that the Appellate Division applied the federal doctrine of prospectivity to a claimed federal right as it believed this Court would do as a matter of federal law.[9] Moreover, the New York courts have resolved against petitioners' their argument that the New York refund stat-

[9]The courts in New York have applied the prospectivity analysis of *Chevron Oil* to determine whether a judicial decision is to be applied prospectively only, although they have generally concluded the conditions for applying the decisions prospectively only were not satisfied in those cases. *See, e.g., Gager v White*, 53 N.Y.2d 475, 483-84, 442 N.Y.S.2d 463, 465-66, 425 N.E.2d 851, 853-54, *cert denied sub nom. J.E. Guertin Co. v Cachat* 454 U.S. 1086 (1981); *Guernee v Aetna Life and Casualty Co.*, 55 N.Y.2d 184, 191-93, 448 N.Y.S.2d 145, 146-48, 433 N.E.2d 128, 130-31, *cert denied*, 459 U.S. 837 (1982); *Matter of McCann v Scaduto*, 71 N.Y.2d 164, 176 n 3, 524 N.Y.S.2d 398, 403 n 3, 519 N.E.2d 309, 314 n 3 (1987); *Axelrod v New York State Teachers Retirement System*, 154 A.D.2d 827, 828, 546 N.Y.S.2d 489, 490 (3d. Dept 1989); *Schumaker v Town of Cortlandt*, 124 A.D.2d 129, 137-39, 511 N.Y.S.2d 351, 356-58 (2d Dept.), *lv denied*, 70 N.Y.2d 603, 518 N.Y.S.2d 1026, 512 N.E.2d 552 (1987). A related prospectivity analysis has been employed by the New York courts in real property tax refund cases where the governmental entity reasonably relied on the revenues and where retroactivity would "cause disorder and confusion in public application affairs even though there may be a strict legal right." *See, Foss v City of Rochester*, 65 N.Y.2d 247, 260, 491 N.Y.S.2d 128, 135, 480 N.E.2d 717, 724 (1985); *Matter of Hellerstein v Town of Islip*, 37 N.Y.2d 1, 13-14, 371 N.Y.S.2d 388, 399, 332 N.E.2d 279, 287 (1975); *Hurd v City of Buffalo*, 41 A.D.2d 402, 405-406, 343 N.Y.S.2d 950, 953 (4th Dept. 1973), *affd*, 34 N.Y.2d 628, 355 N.Y.S.2d 369, 311 N.E.2d 504 (1974).

Neither case cited by petitioners in support of their argument that the New York Court of Appeals has "categorically rejected" financial hardship to deny a remedy involved the prospectivity of a judicial decision. *Flushing Nat'l Bank v Municipal Assist. Corp.*, 40 N.Y.2d 731, 390 N.Y.S.2d 22, 358 N.E.2d 848 (1976), involved New York City legislation which imposed a three year moratorium on actions to enforce the city's

(Footnote continued.)

utes require refunds regardless of any defense that *Davis* should be applied prospectively only; thus that state law issue does not present a basis for granting the writ of certiorari.

POINT III

The decision below does not conflict with *Hafer, Howlett* or *Felder.*

Petitioners' argument that the decision below conflicts with various decisions of this Court become academic if this Court affirms *Harper,* as we believe it should. Their contentions provide no independent basis for granting the writ of certiorari even if this Court were to hold in *Harper* that *Davis* must be applied retroactively.

Petitioners argue (Pet, p 22), cryptically, that the Appellate Division, in dismissing their cause of action under 42 U.S.C. § 1983, somehow redefined their federal cause of action, thereby creating a conflict with *Howlett v Rose,* 496 U.S. 356 (1990). They claim that they are entitled to a final and binding determination under section 1983 that respondents "may no longer enforce the illegal scheme". The Appellate Division, however, did not redefine the federal cause of action, but merely applied federal law to the circumstances of this case, and held that New York's former tax

(Footnote continued.)
outstanding short-term obligations. In fact, in *Alliance of Am. Insurers v Chu,* 77 N.Y.2d 573, 569 N.Y.S.2d 364, 571 N.E.2d 672 (1991), the Court of Appeals, in dicta, recognized that legislation which retroactively affects pre-existing rights may be sustained after balancing a number of factors, including "fairness to the parties, reliance on pre-existing law, the extent of retroactivity and the nature of the public interest to be served by the law". 77 N.Y.2d at 586, 569 N.Y.S.2d at 370, 571 N.E.2d at 678.

laws did not violate petitioners' rights because *Davis* is to be given only prospective effect. Aside from this fact, to the extent that petitioners argue that they are entitled to a declaration or an injunction that respondents may not interfere with their rights to refunds, petitioners are in effect seeking retroactive relief in the form of damages against the State of New York, a remedy clearly barred by the Eleventh Amendment. *See, Edelman v Jordan,* 415 U.S. 651, 663 (1974); *Great Northern Life Ins. Co. v Read,* 322 U.S. 47, 53-54 (1944). And because the New York Legislature immediately amended the State's former Tax Law to bring it into compliance with the *Davis* ruling, effective for all pension benefits received after January 1, 1989, any need for declaratory or injunctive relief with regard to the former statute was obviated. Thus respondents fail to understand how the decision below conflicts with *Howlett v Rose.*

Next petitioners contend (Pet, p 22) that they are entitled to damages from the State respondents in their individual capacities, and that the Appellate Division's decision in this regard conflicts with *Hafer v Melo,* ____ U.S.____, 112 S. Ct. 358, 116 L. ed. 2d 123 (1991). The Appellate Division, however, correctly held that petitioners failed to make a factual showing that respondents were personally and directly involved in any violation of their federal rights. Each of the named petitioners submitted self-assessing personal income tax returns and voluntarily paid income taxes on their pensions received prior to 1989. Except for the mere processing of these returns and payments, there was no involvement by anyone from the State, let alone respondents, in collecting or assessing taxes on petitioners' federal pensions. Nor could respondents have participated in denying any refund claims, as petitioners did not file administrative claims for refunds with the Department of Taxation and

Finance until long after this action was commenced.[10] An action for damages under 42 U.S.C. § 1983 against a governmental official in his or her individual capacity lies only upon a factual showing that the official caused the deprivation of a federal right. *See, Al-Jundi v Estate of Rockefeller,* 885 F.2d 1060 (2d Cir. 1989); *Williams v Smith,* 781 F.2d 319, 323-324 (2d Cir. 1986). Even if personal involvement in the alleged deprivation had been shown, the Appellate Division was clearly correct in holding that the respondents are shielded from liability by qualified immunity. *See, Swanson v Powers,* 937 F.2d 965 (4th Cir. 1991), *cert denied,* ____ U.S. ____, 112 S. Ct. 871, 116 L. ed. 2d 777 (1992). Neither of the Appellate Division's rulings with regard to the section 1983 claim for damages conflicts in any way with *Hafer v Melo.*

Lastly, petitioners argue (Pet, pp 23-24) that the Appellate Division's rationale for denying their application for class certification conflicts with this Court's decision in *Felder v Casey,* 487 U.S. 131 (1988). The Appellate Division denied class certification based on New York precedent holding that class certification is generally inappropriate where governmental actions are involved and subsequent plaintiffs will be adequately protected under the doctrine of *stare decisis* (Pet App 16a-17a, 174 A.D.2d at 266, 579 N.Y.S.2d at 692.

In *Felder v Casey,* the Court held that a Wisconsin notice-of-claim statute may not be applied to § 1983 actions because such a device "predictably alter[ed] the outcome of § 1983 claims depending solely on whether they [were]

[10]These claims, as well as all others seeking refunds on the basis of *Davis,* are being held in abeyance pending the final outcome of this litigation.

brought in state or federal court". 489 U.S. 131, 152. The general rule in New York that class certification is inappropriate where governmental operations are involved and subsequent plaintiffs will be adequately protected is merely a presumption based on New York's class action statute which contains a prerequisite that a class action be the superior method for adjudicating the controversy. NY C.P.L.R § 901(a)(5); *see, Martin v Lavine*, 39 N.Y.2d 72, 75, 382 N.Y.S.2d 956, 958, 346 N.E.2d 794, 796 (1976); *Jones v Berman*, 37 N.Y.2d 42, 57, 371 N.Y.S.2d 422, 432, 332 N.E.2d 303, 311 (1975); *Oak Beach v Town of Babylon*, 100 A.D.2d 930, 930, 474 N.Y.S.2d 818, 819-20 (2d Dept. 1984); *cf., Matter of Lamboy v Gross*, 126 A.D.2d 265, 273-74, 513 N.Y.S.2d 393, 399 (1st Dept. 1987). This general rule is not outcome-determinative. In this case petitioners have not shown that similarily situated taxpayers will not be adequately protected by the doctrine of *stare decisis*. Regardless of class certification, if petitioners are successful, other taxpayers seeking refunds for taxes paid on their federal pensions need only file timely claims with the Department of Taxation and Finance to obtain their refunds.[11] Aside from the ministerial task of calculating the amount of taxes paid that were attributable to federal pension income,

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[11]*Garrett v Bamford*, 538 F.2d 63 (3d Cir), cert denied, 429 U.S. 977 (1976), cited by petitioners, Br, pp 23-25, is inapposite. There, numerous homeowners brought an action on behalf of themselves and other members of a class challenging a county method of assessing property taxes as racially discriminatory. The Third Circuit held that the federal action was not barred by the Tax Injunction Act because plaintiffs lacked a plain, speedy and efficient remedy in the Pennsylvania state courts. The court there was concerned that without the class action mechanism, the financial burden for each individual taxpayer of gathering extensive evidence and expert testimony would make the litigational expense of the states' statutory review procedures "forbidding, if not insurmountable". 538 F.2d at 471. Such insurmountable financial and evidentiary burdens will not be suffered by individual taxpayers who are not named parties in this action.

the administrative procedure for obtaining refunds will not be cumbersome. There has been no showing that respondents will flaunt any declaratory judgment in petitioners' favor such that *stare decisis* will not adequately protect the rights of similarly situated taxpayers. Thus, petitioners' argument does not provide a basis for granting a writ of certiorari.

CONCLUSION

The writ should be denied.

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November 19, 1992

Respectfully submitted,

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